United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

235

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24751

UNITED STATES OF AMERICA

V.

EARL THOMAS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 3 1971

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STATEMENT OF QUESTIONS PRESENTED

1. Whether convictions of involuntary manslaughter and cruelty to child can be sustained where evidence of prior assaults upon the child is admitted and the trial court not only omits to give the jury an immediate cautioning instruction but fails to give such an instruction at any time, and the record discloses no manifest and explicit waiver of same by defense counsel?

2. Whether convictions of involuntary manslaughter and cruelty to child can be sustained where testimony of a prior vicious assault upon the child's mother is presented and the trial court not only fails to declare a mistrial but does not even strike said testimony and admonish the jury to disregard it?

3. Whether conviction of cruelty to child can be sustained where the trial court in its instructions to the jury (a) fails to include an element of the offense and (b) fails to advise them — in a case wherein evidence of prior assaults has been admitted — that the alleged cruelty with which they are to concern themselves must have occurred on or about October 11, 1963, the date alleged in the indictment?

4. Whether it was permissible to convict the defendant of cruelty as well as involuntary manslaughter where there was no evidence that, on the date alleged in the indictment, he did anything other than scald the child, thereby causing injuries which resulted in the child's death?

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* Cases principally relied upon.

This case was not previously before this court.

JURISDICTIONAL STATEMENT

Appellant was charged with second degree murder, 22 D.C. Code, Section 2403, and also with violating the Cruelty to Child statute, 22 D.C. Code, Section 901. After trial, the jury returned verdicts of involuntary manslaughter and "guilty as charge" on the cruelty charge. Judgment of conviction was entered on September 18, 1970, and appellant was sentenced to serve four to twelve years imprisonment on the manslaughter conviction and eight to twenty-four months imprisonment on the cruelty conviction, said sentences to run concurrently. Notice of appeal was timely filed. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291, and Rule 37, Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE [1/]

In Criminal Action No. 1855-68, Earl Thomas, in a two-count indictment, was charged with second degree murder by scalding one Joseph Hill (a fourteen month old infant) with boiling water, thereby causing injuries from which the child died, and also with "torturing, abusing and otherwise wilfully maltreating" the baby. Both crimes were charged to have occurred on or about October 11, 1968. In support of its charges against Thomas, the Government's principal witnesses were as follows:

1/ Since the four segments of the trial proceedings use duplicate numbering, appellant has – to avoid confusion– divided them into four volumes, as follows: Volume 1 – June 1, 1970; Volume 2 – A.M., June 2, 1970; Volume 3 – P.M., June 2, 1970; Volume 4 – Instructions to Jury. References will be made to the applicable volume, succeeded by the letters "Tr." and page number. E.g., (1 Tr. 42); (2 Tr. 28); (4 Tr. 7).

Dr. Jonathan Schwartz: Dr. Schwartz testified that on the morning of October 12, 1968, at Children's Hospital, he saw the injured child, Joseph Hill, who had bruises on his upper extremities, particularly the left palm, a human bite on his left hand and burns to the lower portion of his body; that the burn pattern was inconsistent with a "splash" injury but typical of an "immersion"burn; that the child died on October 27, 1968 (1 Tr. 10-14).

Dr. Mary Turak: Dr. Turak testified that when she first saw the child — about 11:00 P.M. on October 11, 1968, he had burns over the lower half of his body. In addition, there were multiple bruises over the upper half of the child's body, especially noticeable over the left cheek and on the chest and on both arms. And, she said, the baby's left arm, wrist and hand were somewhat swollen (2 Tr. 17-18).

Dr. Richard Whelton: Dr. Whelton, the then Coroner, testified that the child died of complications of burns, medically called septisemia blood poisoning (2 Tr. 60).

Carolyn Hill: Miss Hill, the mother of the deceased child, testified that she and Earl Thomas started living together about four months prior to the date the baby was scalded, at an apartment on New York Avenue; that on October 11, 1968, she bathed the baby, dressed him and left him in the care of Earl Thomas when she departed for work at 6:00 P.M., that at about 11:00 P.M., when she arrived home from work, Thomas told her that he had accidentally knocked a pot of hot water off the stove and some spilled upon the baby; that she examined the baby and noticed that his body

was raw, that he had a ring around his stomach below the navel and that he had splashes on him above that area; that she and Thomas then accompanied the child, in an ambulance, to Children's Hospital and remained there until about 8:00 A.M. the next morning (1 Tr. 20-39).

In response to questions by the prosecutor, Miss Hill also testified in detail not only to two prior alleged assaults by Thomas upon the child, but also to one such assault upon herself, as follows:

(1) that one Sunday in the latter part of September she and one Doretha Davis, who lived in the apartment below, went out, leaving the baby with Thomas. Upon her return home, the first thing she noticed was the baby lying on the bed with a black eye, a bite on his hand, spots on his hands and chest and a scratch on his face. The scratch, she stated, "looked like a cigarette burn" to her. She said Thomas claimed that the baby had fallen off the bed and was burned by grease popping from some meat that was cooking on the stove. And, she declared, Thomas refused to allow her to take the child to a hospital (1 Tr. 25-27).

(2) that one night about two or three weeks prior to the October 11th scalding incident, while she, Thomas, Doretha and the latter's boyfriend were playing cards, the baby awakened and started crying, whereupon Thomas "slapped him on the beam and hit him on the bottom of his feet"; that she and Thomas then got into an argument over his beating the child, whereupon "he strangeld me and he slapped me and about that time I was pregnant with his child." She stated that, as a result of its beating by Thomas, the baby's feet became so swollen until she could not put shoes on them (1 Tr. 28-29).

Doretha Davis: Concerning the two prior assaults, Miss Davis, the downstairs neighbor, testified as follows:

(1) Referring to the "Sunday" incident [which she thought was in early October (2 Tr. 42)], she stated that when she and Carolyn Hill returned to the latter's apartment, the baby's face was swollen and he also had a black eye and a bite mark on his cheek (2 Tr. 29).

(2) Referring to the "card playing" incident, she testified that when the baby started crying, Thomas got up and beat him on both of his feet with his open hand; that the next day Carolyn Hill couldn't get the baby's shoes on its feet;that she, too, saw the swollen feet (2 Tr. 28).

Dorothy Davis: Mrs. Davis, Doretha's mother, resided in the same apartment building. She testified that she saw the baby on the day of the "Sunday" incident, and that it had a black eye, a swollen hand and a swollen face (2 Tr. 46-47). The baby did not, she stated, have any scratch on his face and she didn't see any bite marks on him (2 Tr. 54).

The trial court at no time gave the jury any cautionary instructions pertaining to the "previous assault on child" testimony of the witnesses Carolyn Hill, Doretha Davis and Dorothy Davis. Nor did the trial court strike — and advise the jury to disregard altogether — the testimony of Carolyn Hill relating to the prior assault upon herself.

Testifying in his defense, Earl Thomas stated that on the night of October 11, 1968, in preparing his dinner, he had three pots on the stove; that while in the process of changing the baby's diapers he noticed one of the pots was boiling over, so he took one step into the kitchen — carrying the baby with him — sat the baby on the floor and started to lift the lid

off one pot when his elbow struck another pot, causing it to overturn and spill upon the baby (3 Tr. 16–18 , 46–47). He denied having done anything to the baby either at the time of the "card playing" incident or at the time of the "Sunday" incident (3 Tr. 33–34).

In the course of his testimony, Thomas mentioned another incident, when the baby fell of the bed and struck his head (3 Tr. 34–35). It might have taken place a few days prior to the night of the scalding, he recalled (3 Tr. 40). He was vigorously cross-examined about the lack of precautions taken by him to insure that the baby would not fall out of a bed (3 Tr. 40–42).

Thomas was also cross-examined about "the cigarette burns on (the baby's) face or body" (3 Tr. 42). This question obviously referred to the "Sunday" incident about which the prosecution witnesses had earlier testified. Again, the trial court gave no cautionary instruction.

SUMMARY OF ARGUMENT

I

In the abscence of manifest waiver by defense counsel, it is plain error for the court not to give an immediate cautioning instruction whenever evidence is allowed in which is admissible only for a limited purpose. Here, there was no manifest waiver and the error is even more plain because no cautioning instructions (concerning the testimony of prior assaults upon the child) were given to the jury at any time. Thus, appellant's convictions on both counts should be reversed.

II

The obviously prejudicial testimony concerning the defendant's prior strangulation of the child's mother, at a time when she was pregnant with his child, was inadmissible for any purpose. The trial court, sua sponte, should have either declared a mistrial or — at the very least — stricken said testimony and immediately admonished the jury to disregard it. The failure to do the latter was plain error necessitating reversal of both convictions.

III

A. In his instructions pertaining to Count 2 of the indictment the trial court failed to advise the jury that they must find beyond a reasonable doubt that the defendant acted wilfully. The omission of this element from the charge was plain error.

B. Nor did the trial court, who had allowed in considerable evidence relating to prior assaults upon the child, advise the jury that the only

cruelty for which the defendant was on trial must have occurred on or about October 11, 1968, the date alleged in the indictment. The failure to so charge the jury was another example of plain error.

IV

Since there was no evidence that the defendant did anything on October 11, 1968 other than scald the child, thereby causing injuries which resulted in its death, it was impermissible to convict him of cruelty as well as involuntary manslaughter. On the evidence presented, the former, though not technically a lesser included offeese, "merged" with the latter.

ARGUMENT

I

With respect to this Argument, appellant desires the Court to read the following pages of the reporters' transcript: 1 Tr. 25-29; 2 Tr. 28, 29, 42, 46, 47, 54; 3 Tr. 42; 4 Tr. 18, 20, 22, 25.

THE TRIAL COURT COMMITTED PLAIN ERROR IN NOT, AT ANY TIME, GIVING THE JURY A CAUTIONING INSTRUCTION REGARDING EVIDENCE OF PRIOR ASSAULTS UPON THE CHILD, SINCE THERE WAS NO MANIFEST WAIVER OF SAME BY DEFENSE COUNSEL

In United States v. McClain, Slip Opinion No. 22,652 (decided January 27, 1971) the defendant, charged with second degree murder for allegedly pushing his wife from the porch of their home, causing injuries which resulted in her death, was convicted of manslaughter. This Court found plain error necessitating reversal of the conviction, in the admission, without immediate cautioning instruction, of evidence that two months earlier the defendant had struck his wife on the head with a chair. "The danger of prejudicial effect from such testimony (admissible only on the issue of malice) is so great", the Court noted, "that only an immediate instruction can be considered sufficient to protect defendants" (Slip Op. p. 10). The Court allowed that defense counsel, for tactical reasons, might wish to waive said cautioning instruction, but set forth a rigid standard in that regard, as follows:

> (The waiver) must be explicit; there must be a clear statement that the particular instruction in question is being waived, and it must appear from the record that the waiver was made on

tactical grounds, rather than counsel's misapprehension as to the law (Slip Op. p. 9).

Suffice it to say, in the instant case there was no waiver under the above standard and not only no immediate cautioning instruction [2] but none given at any time. Thus, the evidence of two prior assaults upon the child was allowed in for the jury's consideration without any limitation whatsoever. Here, as in McClain, "the relation between the various pieces of evidence and the offenses charged was not simple". [3] And here too, the defendant was entitled to instructions delineating the proper scope of the prior assault testimony. It was plain error not to give them, requiring reversal of both convictions.

2/ See United States v. Bussey, ___ U.S. App. D.C. 432 F.2d 1330 (1970) (failure to give immediate cautioning instruction not cured by later giving said instruction in charge-in-chief).

3/ The jury here once asked the court to give it in writing a definition of second degree murder and manslaughter (4 Tr. 22). Later, they asked for another reading of the definition of involuntary manslaughter (4 Tr. 25). They also inquired (1) if we make a finding that Earl Thomas took action with malice that resulted in the death of the child, is it required that we make a finding that he is guilty of either second degree murder or manslaughter? (4 Tr. 18) and (2) is it possible to make a finding of not guilty on the first count and guilty on the second count? (4 Tr. 20).

II

With respect to this Argument, appellant desires the Court to read the following pages of the reporters' transcript: 1 Tr. 28-29.

> UPON RECEIPT OF TESTIMONY CONCERNING A PRIOR ASSAULT BY THE DEFENDANT UPON THE CHILD'S MOTHER, THE TRIAL COURT, SUA SPONTE, SHOULD HAVE DECLARED A MISTRIAL OR — AT THE VERY LEAST — ORDERED THE TESTIMONY STRICKEN AND IMMEDIATELY ADMONISHED THE JURY TO DISREGARD IT. FAILURE TO DO THE LATTER WAS PLAIN ERROR

In relating to the court and jury the details of one of the alleged prior assaults by the defendant upon the infant, Joseph Hill — testimony in itself prejudicial — the witness Carolyn Hill (Joseph's mother) compounded the prejudice a hundredfold when she exclaimed that, upon her getting after Thomas for beating the baby, "he strangled me and he slapped me and about that time I was pregnant with his child" (1 Tr. 29). It would be difficult to imagine testimony more inflammatory and prejudicial. Moreover, it was totally inadmissible for any purpose. The trial court, sua sponte, should have either declared a mistrial or — at the very least — ordered the testimony stricken and immediately admonished the jury to disregard it. 4/ The defendant was not on trial for beating or strangling the pregnant mother of his unborn child.

4/ This is not to infer that the latter course of action, standing alone, would be sufficient. In such a situation the trial court should sua sponte declare a mistrial unless defense counsel indicates that, for tactical reasons, he wishes the trial to proceed.

And the jury in this case should not have been afforded the luxury of the opportunity to punish him for those deeds. [5/] That such luxury was afforded the jury requires the reversal of both the conviction of involuntary manslaughter and cruelty to child.

5/ "The temptation to punish him for both crimes was undoubtedly very great" United States v. Bussey, supra, note 2, 432 F 2d at 13. See also Drew v. United States, 118 U.S. App. D.C. 11, 15,331 F 2d. 89 89 (1964), wherein this Court declared:

> It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged.

III

With respect to this Argument, appellant desires the Court to read the following pages of the reporters' transcript: 4 Tr. 7, 10.

A. THE TRIAL COURT OMITTED THE ELEMENT OF WILFULNESS FROM IT'S CHARGE UNDER COUNT TWO. THIS WAS PLAIN ERROR.

The trial court's charge on Count 2 of the indictment reads, in its entirety, as follows:

> Now, Title 22, Section 901 of the District of Columbia Code involves cruelty to children and reads in pertinent part as follows, but I will not read the entire provision but just the pertinent section: Any person who shall torture, cruelly beat, abuse or otherwise wilfully maltreat any child under the age of eighteen years shall be punished as provided in this section of the Code.
>
> The essential elements must be proved beyond a reasonable doubt by the Government and they are:
>
> (1) that a person tortured, cruelly beat or abused, or mistreated the child
>
> (2) that the child at the time was under the age of eighteen years (4 Tr. 10).

As noted above, the court failed to instruct the jury that in order to convict, they must find that the defendant acted wilfully.[6/] This constituted plain

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6/ that is, with an evil state of mind. Mullen v. United States, 105 U. S. App. D.C. 25, 263 F2d 275 (1953).

error[7], requiring reversal of the cruelty conviction.[8]

B. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO INSTRUCT THE JURY THAT IN ORDER TO CONVICT UNDER COUNT TWO, THEY MUST FIND THAT THE CRUELTY OCCURRED ON OR ABOUT OCTOBER 11, 1968, THE DATE ALLEGED IN THE INDICTMENT.

Under the circumstances of this case, the trial judge was duty bound to instruct the jury that, in order to convict the defendant under Count 2, they must find that "on or about October 11, 1968", the date alleged in the indictment, he committed any of the acts proscribed by the Cruelty to Child statute. This is so because the prosecutor in his case in chief had elicited testimony concerning two prior allleged assaults upon the child by the defendant and had, in cross-examining the defendant, elicited testimony which may have tended to show neglect or maltreatment of the child on a third occasion (See 3 Tr. 40-42). Thus, absent an instruction confining the jury to the date alleged in the indictment, the "guilty" verdict on Count 2 could refer to (a) the "Sunday" incident (b) the "card playing" incident or (c) the third incident, pertaining to the failure to take proper measures to insure against the infant falling out of bed.

7/ Byrd v. United States, 119 U.S. App. D.C. 360, 342 F2d 939 (1965).

8/ Because of the myriad adverse collateral consequences of such a conviction, this Court should, despite the imposition of concurrent sentences, exercise its discretionary power to decide the validity of said conviction. Benton v. Maryland, 395 U.S. 784 23 L Ed. 2d 707 (1969): United States v. Hooper, ___U.S. App. D.C. ___, 432 F 2d 604 (1970): United States v. Spears, Slip Op. No. 23,043 (decided Feb. 16, 1971).

There is a fundamental unfairness in charging a defendant with being cruel to a child on a particular date and allowing a jury to convict him if they find that he was ever cruel to the child. The failure to give the jury such instructions as would have precluded such a result was plain error. 9/

9/ See Stevenson v. United States, 127 U.S. App. D.C. 43,380 F 2d. 590 (1967) and Borum v. United States, 127 U.S. App. D.C. 48,380 F 2d. 595 (1967), wherein the court made specific references to the dates alleged in the indictments in charging the jury.

IV

With respect to this Argument, appellant desires the Court to read the following pages of the reporters' transcript: 1 Tr. 10-14, 25-29; 2 Tr. 17-18, 28-29; 3 Tr. 40-42.

UNDER THE EVIDENCE ADDUCED, THE CRUELTY "MERGED" WITH THE INVOLUNTARY MANSLAUGHTER, THUS PRECLUDING A SEPARATE CONVICTION THEREOF

In the instant case there was no evidence that, on October 11, 1968, the defendant did anything other than scald the baby (accidentally, he asserted), thereby causing injuries which resulted in its death. Thus, it was impermissible to convict him of Cruelty as well as involuntary man slaughter. On this evidence the former, though not technically a lesser included offense, "merged" with the latter. 10/ All the evidence of other injuries, to wit, black eye, cigarette burns, human bite, scratches, swollen face and hands, etc., related to (1) the "Sunday" incident, (2) the "card-playing" incident or (3) the third incident pertaining to the baby's falling from a bed.

10/ Prince v. United States, 352 U.S. 322, 1 L. Ed. 2d 370 (1957); Bryant v. United States, 135 U.S. App. D.C. 138, 417 F 2d 555 (1969); United States v. Parker, Slip Opinion No. 23,797 (decided Feb. 9, 1971); United States v. Spears, supra, note 8.

CONCLUSION

WHEREFORE, Appellant respectfully submits that as to each Count, the judgment of the lower Court should be reversed and the case remanded with instructions to grant a new trial.

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Appeal from the United States District Court for the District of Columbia

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Cr. No. 1855-68

United States Court of Appeals
for the District of Columbia Circuit

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Where testimony of prior assaults was admitted for multiple purposes, and *United States* v. *McClain* had not yet been decided by this Court, did the trial court commit reversible error by not giving an immediate cautionary instruction as to the purpose for which the jury might consider the testimony?

2. Was the jury adequately instructed as to the date of the offenses which they were to consider and as to the inclusion of willfulness as an element of the crime of cruelty to children, when the court in the course of its charge read the indictment which specified the date and read the statute which stated that willfulness was an element of the crime?

3. Do the crimes of manslaughter and cruelty to children merge when they have no common elements and when the governmental and societal interests involved are separate and distinct?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,751

UNITED STATES OF AMERICA, APPELLEE

v.

EARL THOMAS, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed November 18, 1968, appellant was charged with second-degree murder (22 D.C. Code § 2403) (count one) and cruelty to children (22 D.C. Code § 901) (count two). Trial [1] was com-

[1] The trial consisted of four court sessions. Three court reporters transcribed the proceedings in four separate transcript volumes, each of which commences with page one. Accordingly, the transcript will be cited as follows: "Tr. I" for the volume containing the June 1 afternoon session; "Tr. II," the June 2 morning session; "Tr. III," the June 2 afternoon session; and "Tr. IV," the June 3 morning and afternoon sessions (consisting of the courts instructions and the jury's verdict).

menced on June 1, 1970, before the Honorable John Lewis Smith, Jr., sitting with a jury. On June 3, 1970, the jury returned a verdict of not guilty of second-degree murder but guilty of the lesser included offense of manslaughter (22 D.C. Code § 2405) under count one[2] and guilty as charged under count two. On September 18, 1970, appellant was sentenced by Judge Smith to concurrent terms of imprisonment of four to twelve years on count one and eight to twenty-four months on count two. This appeal followed.

The Government's Case

Evidence of Malicious Intent

At trial, Carolyn[3] O. Hill testified that she was the mother of Joseph Hill (Tr. I: 22-23), the victimized fourteen-month-old infant. Having become intimate with appellant, Miss Hill and appellant assumed a meretricious cohabitation at 216 New York Avenue, N.W., Miss Hill bringing with her into the household her infant son, Joseph. At the time they moved to their common dwelling in 1968,[4] Miss Hill thought of Joseph as being a "healthy," "ordinary," "normal" baby (Tr. I: 24).[5]

As Miss Hill and appellant continued to reside together, there emerged feelings of discontent after the passage of a brief period of time. Appellant regarded

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[2] The jury was instructed to deliberate on a verdict for the crime of manslaughter only if they reached a verdict of not guilty on the charge of second-degree murder (Tr. IV: 11, 16).

[3] In volumes I and II of the transcript Miss Hill's first name is spelled "Carolyn"; in volume III, however, it appears as "Caroline."

[4] The specific date on which Miss Hill and appellant acquired their common abode was not known by any of the witnesses. It was variously described as May, June, August or September 1968 (Tr. I: 21-23, 65; Tr. II: 27, 45). Appellant himself, making reference to the weather and noting that it was "getting cold," calculated the month to be July or August (Tr. III: 37-38).

[5] This assessment was corroborated by Doreatha Davis (Tr. II: 28) and her mother, Dorothy Lee Davis (Tr. II: 43, 45-46). See notes 7 and 8, *infra*.

with disapprobation Miss Hill's occasional desire to leave the apartment for a few hours. Nevertheless, one Sunday in the latter part of September,[6] Miss Hill and Doreatha Davis,[7] her girl friend and downstairs neighbor,[8] departed for church. Prior to their leaving the baby "was all right. He was already clean and he was fed and everything." (Tr. I: 26.) However, upon their return from church, a "girl whose name was Betty . . . Fulton," apparently a neighbor, was at the apartment portal (Tr. I: 26). Miss Hill testified that upon entering "the first thing I noticed was the baby laying on the bed with a black eye and a scratch on his face and a bite on his hand" (Tr. I: 26).[9] When she inquired of appellant what had occurred, he told her that "the baby fell off the bed and he had spots on his hands and on his chest" (Tr. I: 26). Miss Hill testified further:

> I asked him how did it happen, and he told me that he had him [the baby] by the stove and he had some meat on the stove and the stuff started to pop on the baby from the meat on the stove. That's how come he had the scratch. It looked like a cigarette

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[6] The precise date was not recalled by any of the witnesses (Tr. II: 42, 46, 53-54).

[7] Doreatha Davis is frequently referred to by the witnesses by her nickname, "Tiny" (Tr. I: 25-26). In volume I of the transcript her name is inaccurately spelled "Doretha." When she testified, she provided the court with the correct spelling of her name (Tr. II: 25).

[8] Miss Doreatha Davis lived with her grandmother in the apartment directly beneath the one occupied by appellant and Miss Hill (Tr. II: 26).

[9] This testimony was corroborated by the testimony of Doreatha Davis (Tr. II: 29, 42) and her mother, Dorothy Lee Davis (Tr. II: 46, 53-54). Dr. Mary Turak, a pediatrician at Children's Hospital, testified that when the infant was admitted to the hospital (for treatment in the indicted offense, *infra*) he had a "series of indentations on the [left] hand . . . [which was] consistent with a bite pattern" (Tr. II: 24-25). Dr. Jonathan Schwartz, a pediatric surgeon attached at the time to Children's Hospital, concurred that a wound appearing to be a "human bite" was on the infant's left hand (Tr. I: 7-10).

> burn to me. He said it was a meat burn from the grease popping out. But I thought it was a cigarette burn. So Earl said he really didn't have no excuse about the thing at all. (Tr. I: 26-27.)

Yet, when Miss Hill made an attempt to take the baby to the hospital, appellant would not let her do so (Tr. I: 25-27).

On another occasion, "two or three weeks before he [the baby] got scalded" [10] (Tr. I: 28), the infant suffered additional abuse at appellant's hands. At about 10:00 p.m., in the midst of an evening [11] card game at the Hill-Thomas apartment,[12] baby Joseph awoke crying. Reacting with petulance, appellant went over to the baby and vociferously commanded that he "shut up," but the baby only continued to cry.[13] Miss Hill explained, "So Earl slapped him on the beam and hit him on the bottom of his feet" [14] (Tr. I: 28). When Miss Hill came to the defense of the infant, "a big old argument" ensued. Notwithstanding the fact that Miss Hill was then pregnant with appellant's baby,[15] appellant "slapped" and "strangled" her (Tr. I: 29).

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[10] It was the scalding incident of October 11, 1968, which caused the death of Joseph Hill and gave rise to the indictment in this case.

[11] The precise date of the game was not recalled by any of the witnesses (Tr. I: 28-29; Tr. II: 28-29).

[12] Participants in the game were Doreatha Davis, her boy friend, Miss Hill and appellant (Tr. I: 28).

[13] Miss Hill reflected, "Anyone would know that if you're going to yell at him [the baby], he is going to cry more" (Tr. I: 28).

[14] As a result of the beating of the baby's feet, they swelled to such dimension that it became impossible for him to fit into his shoes (Tr. I: 29). That fact was later corroborated by the testimony of Doreatha Davis (Tr. II: 28-29).

[15] At trial Miss Hill stated that appellant was the father of her sole surviving child (Tr. I: 20-21). However, appellant in his own testimony stated, "I am no father to anybody's child" (Tr. III: 36).

The Indicted Offense

On October 11, 1968, appellant went to work at about 7:00 a.m., as was his custom; he was expected home at about 4:30 p.m. (Tr. I: 30). During the day, as was her custom, Miss Hill attended to the care of the home and the baby. The baby was given a bath, after which he was massaged and decked in infant accouterments. Then he was fully dressed with socks and shoes, diaper and rubber pants, undershirt and a polka-dot outer garment and was permitted to "play around the house." "He could walk and do anything he wanted." His body was unmarked (Tr. I: 31-32). Miss Hill, inveterately fastidious, then cleaned the apartment thoroughly; she waxed the floor, scoured the bathtub, eliminating any bathtub ring, and put every kitchen utensil in its proper place (Tr. I: 30-35). When appellant returned from work, all was in order. Miss Hill then prepared to leave for work herself.[16] She left the fully dressed and recently bathed baby in the care of appellant and then, in the company of Doreatha Davis,[17] departed for work (Tr. I: 30, 35).

At approximately 11:00 p.m. Miss Hill and Doreatha Davis returned from their jobs. Miss Hill's approach to her door was ominous: "Earl [was] at the top of the steps." He said, "Shhhhh . . . Come on up. I have something to tell you." (Tr. I: 37.) Miss Hill "rushed on up to the stairs into the apartment . . . . Earl told [her] that he had a hot pot of water on the stove with an egg in it. And he said he went to pick the baby up and his elbow hit the stove and it hit the back—hit the baby on his back." Miss Hill reacted, "Oh, my God!" (Tr. I:

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[16] Carolyn Hill was employed by the Department of Health, Education and Welfare in Arlington, Virginia. Her hours of employment were from 6:00 p.m. to 11:00 p.m. (Tr. I: 30).

[17] Doreatha Davis was employed at the same place as Miss Hill (Tr. I: 30). Miss Davis further corroborated the fact that there were no unusual marks on the baby's body during the day of October 11, 1968 (Tr. II: 30-31).

37, 72.) She went to the baby and "laid him on the bed . . . opened his blanket . . . and . . . took off the gauze . . ." (Tr. I: 37, 72-77). She exclaimed, "I was so scared I just wrapped him up with anything I could find and rushed [him] across the street" to the fire station, where an ambulance was secured (Tr. I: 38-39, 76-77). In describing baby Joseph's condition Miss Hill testified, "My baby—he had—I took the gauze off his legs and his feet. His feet and legs were—in fact you could see (inaudible) almost to his bottom." "His private appeared to be as big as his legs, and his body was raw . . ." (Tr. I: 38-39).[18] The infant was wrapped from "his waist all the way down" and swiftly transported to Children's Hospital (Tr. I: 38-39).

At the hospital, with the baby in emergency care, Miss Hill, accompanied by appellant, maintained her vigil until the early morning (Tr. I: 39-40). She "was in a state of shock" (Tr. I: 78), "worrying about . . . [the] child" (Tr. I: 80). Upon seeing the doctor unwrap the infant's bandaged body, she became revolted by the extent of Joseph's wounds and "had to leave" the emergency room (Tr. I: 78-79, 81). At "daybreak" (October 12) (Tr. I: 81) she went home and cried (Tr. 83); appellant went directly to bed (Tr. I: 84, 94-95). She had an opportunity to inspect the apartment. The kitchen was unmarred: "[T]here wasn't no pans on the floor or nothing . . . ." There were no scars, food marks or water on the kitchen floor,[19] and the stove was bar-

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[18] Mrs. Dorothy Lee Davis testified that during the evening of October 11, 1968, she was visiting her mother in the apartment directly below the Hill-Thomas unit. See footnote 8, *supra*. At approximately 9:00 p.m. she heard "something drop like a thug" from the living room-bedroom portion of their apartment. She testified that it was not the sound of crashing metal. "It sounded just as if he was thumping, like a bundle would fall over, you know, like something heavy . . ." (Tr. II: 48-51). She further testified that at no time that evening did appellant seek any assistance from her (Tr. II: 51).

[19] Miss Doreatha Davis testified that "the floor was the type of floor where you could tell if anything had been on it . . ." (Tr. II: 39-40).

ren of pots and pans (Tr. I: 41). However, there was a "pool of water . . . on the floor in the living room" (Tr. I: 42, 49; Tr. II: 34, 38-39); "you could feel water pressing your feet [through the rug]" (Tr. I: 42). She then took a chair and sat ruefully by the window. After a moment, however, she got up and went to examine the bathroom. She testified, "I just sit there and something just told me to go to the bathroom. And I went to the bathroom, and that's when I saw my baby's skin in the tub" (Tr. I: 84-85).[20] She confronted appellant seeking an explanation; he merely said that he "'had to wash the baby off, wash the skin off.'"[21] When she sought a further explanation, appellant "went out to go to work." After he made his exit, Miss Hill, engaged in her cleaning chores, found a blood-stained tea towel beneath the bed (Tr. I: 44).

Appellant was without atonement. Miss Hill asserted that he viewed the catastrophe as "no big thing";[22] he was not "sorry or scared or anything"[23] (Tr. I: 54).

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[20] Miss Hill recalled having cleaned the bathroom "real good" (Tr. I: 42). However, she noted that the "ring around the tub . . . was too high for a baby, and it was not enough water for a grown-up ring around the tub" (Tr. I: 42). Her further scrutiny revealed that the "ring" was composed of "pieces of skin . . . . [I]t wasn't flesh dirt. It was just like pieces of skin on it. And inside the draining part, I pulled up some skin out" (Tr. I: 43).

[21] Miss Hill reflected that appellant had never bathed the baby prior to that incident. Although he had changed the baby's diaper upon occasion when they first lived together, he had not done so in the recent past (Tr. I: 53).

[22] Doreatha Davis testified with regard to appellant's general attitude toward the baby. "[H]e just didn't want to be bothered . . . . And any time the baby cried, he would tell Carolyn to shut him up because he didn't want to hear the noise." (Tr. II: 31-32.)

[23] While at the hospital Officer Susan Elizabeth Maloney, assigned to the Youth Aid Division of the Metropolitan Police (Tr. II: 67-68), observed the burned child (Tr. II: 69-70). In a hospital interview with appellant and Miss Hill she advised them that a child-battering investigation was being undertaken. At that interview appellant identified himself as Joseph Hill, the putative father of the infant. Then he told the story of how he placed the baby on the floor next to the stove and then accidently spilled boiling water

As a result of the atrocity, Miss Hill and appellant terminated their living arrangement, with appellant moving out (Tr. I: 52-53).

It was the absolute and unhesitant conviction of all the expert medical witnesses that the burns suffered by baby Joseph were from his immersion into scalding water rather than from the splash of cascading water from an overturned pot.[24] There was a complete absence of satel-

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upon him (Tr. II: 70-71, 73-74). Miss Hill testified that "Earl [appellant] did all the talking" (Tr. I: 98). She continued, "I didn't . . . do too much of the talking because at that time I was told by him not to say anything at all" (Tr. I: 99). The following day, however, Miss Hill telephoned Officer Maloney and arranged to meet her at Doreatha Davis' apartment (Tr. I: 98-99; Tr. II: 7-8, 71-75). It was at that meeting that Officer Maloney learned appellant's real name and was presented with a different version of what occurred. Officer Maloney testified that Miss Hill mentioned that "she was afraid to tell . . . anything" at the hospital because of the presence of appellant (Tr. II: 75). Miss Hill explained her silence at the hospital in her own testimony: "He told me to keep my mouth [*sic*] and don't say nothing . . . . [H]e told me not to say anything at all about the burns and everything." (Tr. I: 100.)

[24] Dr. Schwartz stated, "It is inconceivable for a splash injury to affect the entire circumference of a limb . . . . The pattern is inconsistent with a splash injury." (Tr. I: 13.) Noting the fact that the baby's buttocks were burned, he unhesitantly rejected the possibility that boiling water accidentally fell upon the diapered body of the baby (Tr. I: 13-14, 16-17). He commented further that if the child had climbed into a bathtub filled with scalding water, the burns would have been on all parts of his body (including his hands), because of the infant's efforts to climb to safety. However, the baby's burns were confined to the lower portion of his body, his hands completely escaping injury (Tr. I: 15).

When asked if the burn pattern was such that it could have been caused by boiling water spilled upon the baby, Dr. Turak responded, "I can't conceive of [it being caused by] a spill burn" (Tr. II: 22-23). She elaborated, "If it had been a spilled [*sic*] burn, I would certainly have expected to see some spatter burns over at least the lower part of the abdomen or the hands or face, as if hot water had spilled and splashed, rather than a definite line around the child's body, below which everything was burned." (Tr. II: 19.)

Dr. Richard Whelton, the Coroner of the District of Columbia (Tr. II: 56), was of the opinion that the burns were not caused by a splashing hot liquid; had that been the case, there would have

lite burns which are characteristic of splash burns. The infant's body revealed a clearly delineated line around his waist, below which the entire circumference was burned and above which were no burns—a pattern consistent only with an immersion into scalding liquid. Dr. Turak testified that the temperature of the liquid "would have [had] to be at or near the boiling point"[25] (Tr. II: 20-21). Although he was treated with intravenous fluids, antibiotics, prophylactics against tetanus organisms and silver nitrate solution (to inhibit the growth of bacteria and aid in healing), the child never responded to treatment.[26] Dr. Schwartz testified that he only "pursued . . . a down hill course" until he was pronounced dead[27] on October 27, 1968, after having reposed in Children's Hospital for sixteen days (Tr. I: 11-12, 18).

Dr. Richard Whelton, the coroner, was present at the autopsy performed on the body of Joseph Hill (Tr. II: 56-58). On the basis of his observations and the report

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been a "splash pattern" which was absent here. He stated that there would have been involvement of other body parts. The burn pattern would have extended beyond "just one particular segment of the body" (Tr. II: 63-64). He concluded, "[I]t couldn't have been a splash [burn]." (Tr. II: 67.)

[25] Dr. Turak noted that the water temperature could have been less than boiling and still have caused the same degree of burns if the child was in the water for a "prolonged period of time." However, she indicated that a long period of exposure was unlikely in the instant case because the child would have burned his hands in his attempt to escape from the water. The baby's hands were not burned (Tr. II: 20-21).

Dr. Schwartz testified that the extent of the infant's burns was a function of both the heat of the water and the duration of his exposure to it. It was his opinion that "anything over 120 degrees Fahrenheit would cause a burn like this" (Tr. I: 14).

[26] The child was given a "battered child series" of X-rays (*i.e.*, a skeletal survey) to determine if he had sustained any fractures, but none was apparent (Tr. II: 17, 20).

[27] The body of the dead baby was identified by his mother, Carolyn Hill, at the District of Columbia Morgue (Tr. I: 54-55; Tr. II: 64).

of Dr. Chandra,[28] he was able to render an opinion as to the cause of the infant's death: "The child died of complications of burns, medically called septisemia [*sic*] blood poisoning" (Tr. II: 60). In giving a detailed medical description he commented that the bacterial infection involving many of the body organs originated in the burns (Tr. II: 62). The bacteria "flourish" and "proliferate" in a "burned, denuded serum-coated area of the skin" (Tr. II: 65). Noting that "this pattern of complication is repeated frequently in burn cases" (Tr. II: 62), he concluded that the "infected burns" were the "factual episode" which caused the death of Joseph Hill (Tr. II: 63, 67).[29]

The Defense

The thrust of appellant's defense was provided by appellant himself in his own testimony. His theory was that the act which caused the baby's death was committed accidentally.

When appellant returned from work, he assumed the care and responsibility for baby Joseph. At that time the infant's body was unscathed. Miss Hill, who had not prepared appellant's dinner,[30] left the apartment to go to work (Tr. III: 13-15, 52-53). Appellant testified, "She left about five and I started fixing it [dinner] around seven or something along in there, or 7:30" (Tr.

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[28] Dr. Chandra (whose full name does not appear in the record) performed the autopsy and filed a report. Dr. Whelton's personal observations were compatible with that report. His opinion, as to the cause of the decedent's death, based on his observations and Dr. Chandra's report, was admitted with appellant's sanction. (Tr. II: 59-60).

[29] There was some testimony that the baby suffered from an inadequate supply of vitamins and protein in his diet (Tr. I: 18). However, notwithstanding those nutritional deficiencies, it was the resolute opinion of both Doctors Whelton and Schwartz that but for the burns the child would not have died (Tr. II: 63; Tr. I: 18).

[30] Miss Hill agreed that she had not prepared his dinner before she departed for work (Tr. I: 33).

III: 53). He placed three pots on the stove, including one on the "front-rear"[31] burner; in that pot he boiled water to cook some stringbeans (Tr. III: 16-17, 53-54). He was preparing "stringbeans and potatoes and what not" (Tr. III: 16).

At 9:30 p.m. (Tr. III: 59-60), while the food was still cooking,[32] the tragic misadventure was supposed to have occurred. Appellant, while seated in a chair beside the entrance to the kitchen and "watching TV and what not" (Tr. III: 17), started to change the baby's diaper.[33] He noticed boiling water overflowing from a pot on the stove. Ignoring the fact that the baby's crib was within his reach (Tr. III: 47), appellant carried the baby into the kitchen[34] and placed him in a sitting position on the floor. Appellant gave the following account:

> When I was in the process of changing the baby's diaper, the pot was boiling over, you know, and I went to lift the lid and in the process of lifting the lid, I struck the pot that was sitting on the front-rear and as it was over-turning, I tried to grab it and I held on to it and it was hot and by it being a large pot, the water spilled on the baby and he tried to crawl out of the way.[35] (Tr. III: 18.)

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[31] On direct examination appellant stated three times that the pot in which he cooked the stringbeans was on the "front-rear" portion of the stove (Tr. III: 16-17).

[32] Appellant testified that the stringbeans had been cooking "a good many hours," "I would say 2 or 3." He conceded that he had cooked for himself "a good many times" and thrice stated, "You can't rush food." He acknowledged that he liked his food "slow cooked" (Tr. III: 61-62).

[33] But see footnote 21, *supra*.

[34] On cross-examination appellant was asked, "Why did you bring the baby into the kitchen and put the baby under boiling hot water?" He announced, notwithstanding that he admittedly could have put the baby in his nearby crib, "Well, at the spirit of the moment, I just didn't think" (Tr. III: 46-47).

[35] On cross-examination the prosecutor inquired of appellant how he accounted for the elaborate burns the baby suffered on the rear sides of his legs and his buttocks if the baby was placed in a sitting position beside the stove. Appellant countered, "When the

Appellant lifted the burned body of the baby[36] and placed him in a bed (Tr. III: 18-19). He proceeded to wrap the baby's legs[37] in towels and diapers. Then, leaving the baby unattended[38] and without seeking help,[39] appellant went to a nearby drugstore. He testi-

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water was spilling on him, he turned over and he began to crawl and it was a large pot of water and the water spilled on his legs" (Tr. III: 47). Appellant was then asked to explain the absence of burns on the baby's hands if he tried to crawl from the large amount of cascading boiling water. Appellant offered, "Well, the water probably did not reach his hands at the time." "I would say [he was] crawling out of the way of the water." (Tr. III: 49.) Finally, when asked how he accounted for the clearly delinated burn pattern around and below the baby's waist and the complete absence of spatter burns above his waist, appellant tersely replied, "I don't account for it" (Tr. III: 50).

[36] Appellant indicated that the baby did not "holler" or cry while being burned; indeed, he did not cry virtually the entire evening. According to appellant, when Miss Hill returned home (which was soon after the baby was burned) and the baby was taken to the fire station to be transported to the hospital, the baby had not yet cried (Tr. III: 21).

[37] Appellant admitted that he had liimted experience in the treatment of burns and even that experience was limited to burns caused by lye. Yet with full knowledge that an expert (such as a doctor) would have been a more suitable person to attend to the baby's burns, appellant nevertheless decided to treat the burns without assistance. He said, "An expert would have been better but at the time I decided to do it myself" (Tr. III; 59).

[38] Leaving the infant unattended apparently was not an uncommon thing for appellant to do when the infant was left in his care. In making reference to the time when the infant suffered facial scratches and bruises (described by Miss Hill as a black eye, Tr. I: 26), appellant stated that they were caused when "the baby rolled off the bed," striking his head on a protruding shelf from an adjacent table. He noted that he permitted the infant to crawl around the bed without side rails to guard against potential "accidents" while appellant, the sole person in charge, attended to other matters in the apartment. Appellant agreed that he did not pay any attention to the possibility that he baby might fall from the bed even though he noted that it "is a known factor that this can happen" (Tr. III: 34-35, 39-42, 65-66). Making further reference to the alleged cigarette burns on the baby's face, appellant explained that they were the result of "popping grease" from the stove which injured the infant while he was in appellant's custody (Tr. III: 42-44).

[39] See footnote 40, *infra*.

fied, "I bought an Ace bandage and it cost me a dollar and fifty cents . . ." (Tr. III: 19). Upon returning with the Ace bandage, appellant attempted to re-wrap the infant's legs, but when he removed the old diaper-type bandage the baby's "skin came off" (Tr. III: 19, 28). Appellant then conveyed his reaction: "I went outside and got sick to my stomach and I threw up and I ran to the—let me see. Yes, I called—I do believe I called Dr. Brown to thephone [*sic*]." (Tr. III: 20.) Earlier and later in his testimony he denied making that phone call.[40]

Miss Hill was the first person appellant told of the "accident" (Tr. III: 20-21, 57-58, 60). Appellant testified that it occurred at 9:30 p.m. and that only "five or six or seven minutes" elapsed between the time of the accident and the time Miss Hill "showed on the scene" and was advised of it. However, he had indicated that she did not return from work until 10:30 or 11:00 p.m. (Tr. III: 57-61). After her arrival home, appellant and Miss Hill, in the company of Doreatha Davis, took the baby to the fire station,[41] from which he was taken to the hospital (Tr. III: 21, 46-47).

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[40] Appellant testified on direct examination that he did not make any telephone calls that evening (Tr. III: 15) or in any way seek the aid of others. Notwithstanding his isolated statement that he phoned Dr. Brown (who is not further identified in the record), he later reiterated that he made no phone call that night (Tr. III: 45, 65-66). On cross-examination he said, "I didn't think about calling anybody at the time. I knew I had to get help but I didn't think about calling anybody." (Tr. III: 45.) He lamented, "I wasn't thinking clearly." He admitted at trial that he not only had not phoned for help or sought assistance from his downstairs neighbor, but he had not even asked the druggist to summon aid (Tr. III: 64-66).

[41] Claudie T. Faison, a D.C. Fire Department fireman, was called as a witness for the defense. He tesitfied that he was on duty at the fire station at 219 M Street, N.W., on the evening of October 11, 1968. His testimony, which apparently was offered for the sole purpose of showing that Miss Hill was not one of the women who accompanied appellant to the fire station, was in direct conflict with the testimony of appellant, who said that she did (Tr. III: 3-6).

After spending the night at the hospital, appellant and Miss Hill returned to the apartment; appellant went to "clean . . . up the mess" (Tr. III: 24, 50). He testified, "When I came back from the hospital, the food I had on the floor was looking bad, you know. I keep a clean house and I immediately cleaned it up." (Tr. III: 51.) The diapers which had served as bandages were washed in the bathtub: appellant thus attempted to account for the presence of the baby's skin adhering to the drain (Tr. III: 24, 27, 62-63). He experienced greater difficulty explaining the presence of water on the living room rug. Appellant noted that "water runs" and testified that the cascading water from the pot (which did not scald the hands of the crawling baby (Tr. III: 49)) "had run out" into the living room, soaking an area of approximately eighteen inches in diameter (Tr. III: 25-26, 55). He held steadfast to that testimony even when he acknowledged that the floor was "pretty level" and that water "doesn't run downhill" (Tr. III: 54-57).

In concluding his testimony, appellant stated that he "really loved" Joseph Hill[42] (Tr. III: 12-13, 66). He maintained that he "really loved" him even though he did not call a doctor when the baby fell out of bed striking his head; and even though he did not call a doctor when the baby suffered facial burns from "grease spots" while appellant was cooking; and even though he did not call a doctor when the baby was scalded by boiling water on the evening of October 11; and even though appellant "knew the baby was hurt, and hurt bad" (Tr. III: 44-45, 64-66).

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[42] Appellant had indicated that he "got along real well" with the baby (Tr. III: 10). Miss Hill concurred that appellant and the baby had a good relationship until the latter part of September. She said that that was "before the beatings and scars and burns were on him [the baby]." Although unable to account for the change in appellant's attitude, she noted that at that time appellant "slapped at the least little thing." (Tr. I: 96-97.)

Instructions

At the conclusion of all the evidence appellant renewed his motion for judgment of acquittal; it was again denied (Tr. III: 95). Then apparently noting the lateness of the hour, the court inquired of both counsel if it would be more desirable to dismiss the jury for the day so that the court and counsel could consider the instructions that would be delivered to the jury the following morning. Both counsel were in accord with the suggestion, and the jury was released for the day (Tr. III: 95-96).

While discussing the instructions the prosecutor suggested that the court, "out of an abundance of caution," give an instruction on involuntary manslaughter as a lesser included offense of second-degree murder. In reviewing the prosecutor's proposed draft, both appellant's counsel [43] and the court thought it appropriate for delivery to the jury. Then the prosecutor requested that the court give "the new instruction on malice." Again both the court and appellant's counsel agreed. The judge made reference to a few of the standard instructions and stated that he would include the standard instructions in his charge. Then, specifically addressing appellant's counsel, the court inquired, "Is there anything that you request?" Appellant's counsel promptly responded, "I think that covers it, Your Honor." Thereupon the court adjourned for the day (Tr. III: 96-97). The following morning the instructions were delivered without any prior requests by counsel (Tr. IV: 2).

In delivering its charge to the jury the court included a recitation of the standard instruction on prior inconsistent statements [44] (Tr. IV: 5). It was given exactly as the court had previously delivered it, *sua sponte*, immediately after the prior inconsistent statements were

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[43] Appellant's trial counsel does not represent him on appeal.

[44] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 20 (1966).

offered at trial (Tr. I: 90; Tr. II: 11-14).[45] The court then read the indictment.[46] In making reference to count two, the court, reading from the indictment, stated that willfulness was an element of the offense of cruelty to children (Tr. IV: 7). Later, in reading the relevant portion of the cruelty to children statute, the court again told the jury that willfulness was an element of the offense. This was done immediately after the court defined the term "willfulness" to the jury (Tr. IV: 10).

There was no request by appellant's counsel that the jury be instructed that cruelty to children was a lesser included offense of manslaughter.[47] In addition, there was no request by counsel to have the jury instructed as to the limited purpose for which the evidence of prior assaults on the child were offerred, either at the time they were offered or in the regular charge.[48] Indeed, at the conclusion of the court's charge, appellant's trial counsel at the bench stated to the court, "You did well by the defendant" (Tr. IV: 15).[49]

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[45] When testimony was being heard and reference was made to a prior inconsistent statement (for purposes of impeachment of the witness), the court intervened and gave the appropriate instruction as to the limited use of such a statement by the jury (see footnote 44, *supra*). However, it is noteworthy that the judge assiduously prefaced the instruction by informing the jury that he was compelled by appellate fiat to deliver the instruction at that point in the proceedings (Tr. I: 90; Tr. II: 11-14).

[46] During the instructions the members of the jury were twice advised by the court that they would be permitted to take a copy of the indictment with them into the jury room to aid them in their deliberations (Tr. IV: 7, 15-16).

[47] Indeed, the members of the jury were instructed to consider count one and count two separately and were told that their verdict on either count should not influence their verdict on the other count (Tr. IV: 7-8).

[48] The court did instruct the jury that, in determining appellant's intent, it was permitted to consider "any act done or omitted by the defendant and facts and circumstances in evidence which indicate his state of mind" (Tr. IV: 9-10).

[49] The Government also indicated that it was satisfied with the instructions (Tr. IV: 15).

During the course of its deliberations the jury sent two notes to the court (Tr. IV: 18, 25). The first note contained three questions. The jury inquired whether it was compelled to return a verdict of guilty of either second-degree murder or manslaughter if it found that act which caused the death of the infant was committed by appellant with malice. In contemplating a response to the jury (outside of its presence) the court inquired of appellant's counsel if he had any comments. He replied, "No, I have none" (Tr. IV: 19). The court concluded that it would inform the jury that it could return a verdict of guilty of either offense but was not required to do so (Tr. IV: 19-21). The court then made reference to the second question posed in the jury note: "Is it possible to make a finding of not guilty on the first count and guilty on the second count?" The following colloquy ensued:

> THE COURT: The answer to that is yes.
> MR. COLLINS [the prosecutor]: Yes.
> MR. POOLE [defense counsel]: Yes.
> THE COURT: Do you agree with that, Mr. Poole?
> MR. POOLE: Yes.
> THE COURT: In other words, I will tell them yes.
> (Tr. IV: 20.)

At no time was there a request or even a suggestion that cruelty to children might be considered a lesser included offense under count one or merged with the offense charged in count one. The third question asked by the jury was whether it could have a written definition of second-degree murder and manslaughter. Again, with the sanction of both counsel (Tr. IV: 21), the court refused to give the jury a written statement but reread the requested instructions at a very slow pace (Tr. IV: 22-24).

Approximately one and one-half hours later the jury sent its second note to the court. It again requested that the instruction on involuntary manslaughter be repeated. With both counsel indicating that they had no objection,

the court complied with the request (Tr. IV: 25-27). Soon thereafter the jury returned its verdicts (Tr. IV: 27).

ARGUMENT

I. *United States* v. *McClain* should not be applied retroactively, and in any event it does not apply to this case.

Appellant's initial contention is that the trial court committed reversible error in failing to instruct the jury that the evidence of appellant's prior assaultive conduct upon the baby was offered for a limited purpose. He ingenuously concedes that he never requested such an instruction but, claiming the absence of a manifest waiver, he submits that the error is fatal under *United States* v. *McClain*, —— U.S. App. D.C. ——, 440 F.2d 241 (1971). In our view, however, the asserted error was not as palpable as appellant thinks it was.

At the outset we urge that the rule announced in *McClain* should not be given retroactive effect[30] and, accordingly, should not be held applicable to the case at bar, the trial of which anteceded the *McClain* decision by nearly eight months. In that regard, this Court, approximately one month after its opinion in *McClain*, appeared to signal that *McClain* would be applied only prospectively. In *United States* v. *Marcey*, —— U.S. App. D.C. ——, 440 F.2d 281 (1971), the Court, in

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[30] *See Mackey* v. *United States*, 91 S. Ct. 1160 (1971); *Williams* v. *United States*, 91 S. Ct. 1148 (1971); *United States* v. *White*, 91 S. Ct. 1122 (1971); *Hill* v. *California*, 91 S. Ct. 1106 (1971); *Halliday* v. *United States*, 394 U.S. 831 (1969); *Desist* v. *United States*, 394 U.S. 244 (1969); *Fuller* v. *Alaska*, 393 U.S. 80 (1969); *DeStefano* v. *Woods*, 392 U.S. 631 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Woodard* v. *United States*, 129 U.S. App. D.C. 37, 429 F.2d 716 (1970); *Mordecai* v. *United States*, 127 U.S. App. D.C. 198, 421 F.2d 1133 (1969), *cert denied*, 397 U.S. 977 (1970); *Gaither* v. *United States*, 134 U.S. App. D.C. 154, 174-178, 413 F.2d 1061, 1081-1085 (1969). *But cf. United States* v. *United States Coin & Currency*, 91 S. Ct. 1041 (1971).

affirming a conviction, specifically declined to find plain error in the failure of the trial court *sua sponte* to deliver an immediate cautionary instruction on evidence offered for the limited purpose of proving *mens rea*. The trial court in *Marcey*, as in the case at bar, did not have the benefit of this Court's guidance in *McClain*. In addition, it must not go unnoted that the trial judge in this case was very sensitive to appellate precepts. When evidence of a prior inconsistent statement was employed for purposes of impeachment, the court appropriately interposed an immediate instruction to inform the jury of the limited use to which it could consider the statement.[51] *See Coleman* v. *United States*, 125 U.S. App. D.C. 246, 371 F.2d 343 (1966), *cert. denied*, 386 U.S. 945 (1967). Indeed, in *Coleman* itself, a case compellingly analogous to the one under consideration here, this Court held that the requirement that a cautionary instruction be given immediately after evidence of a prior inconsistent statement is admitted was to be applied only "[f]rom this day forward." It reasoned:

> Any other course is unnecessarily pregnant with dangers to the cause of justice as well as to economy in the employment of our already strained judicial resources . . . . The prospective operation we give this new approach is, we think, consistent with the interests of justice. 125 U.S. App. D.C. at 249, 371 F.2d at 346.

Accordingly, we believe that in the absence of a request by counsel to a diligent court constrained to act without the teaching of appellate precedent, it is not injudicious to conclude that the holding of *McClain* should not be applied to this pre-*McClain* case.[52]

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[51] See footnote 45, *supra*.

[52] Appellant asserts that the court failed altogether to instruct the jury on the use to which it could consider appellant's prior assaultive acts. A more rigorous scrutiny of the record reveals that it is not as silent as he contends. See footnote 48, *supra*. While admittedly the instruction as given was not a paragon of clarity, it did at least treat the issue. *Cf. United States* v. *Moore*, 140 U.S. App. D.C. 309, 435 F.2d 113 (1970).

Notwithstanding *McClain*, we submit that in any event the evidence of the prior assaultive conduct was not offered merely to show malice. Here, unlike *McClain*, there was a two-count indictment, one count of which charged cruelty to a child. There having been no objection to the introduction of the evidence (and consequently no proffer from the prosecutor as to the reason it was offered), it may be inferred that it was offered for multiple purposes, *i.e.*, to show motive, intent, or absence of mistake or accident (appellant's theory of defense). *See Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964). Thus the application of *McClain* is unwarranted here, since the testimony of the prior assaults was not offered merely for a limited purpose.

Furthermore, even if *McClain* were held applicable here, in the context of this case any error must be considered harmless. Rule 52 (a), FED. R. CRIM. P. Assuming error *arguendo*, the applicable test is whether it can be said "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946). We believe that it can be fairly said that the judgment here "was not substantially swayed by the error." The medical testimony revealed a burn pattern which indicated that the infant was malevolently immersed in a scalding liquid. The absence of satellite burns provided ample grounds to reject appellant's theory of accident. This medical evidence alone, in isolation from the balance of the Government's case, was so overwhelming that it cannot realistically be maintained that the testimony pertaining to appellant's prior assaults caused him undue prejudice.[53]

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[53] Appellant's second assignment of error is that the testimony pertaining to appellant's prior assault on the baby's mother, Miss Hill, was improperly received into evidence. Appellant contends, in the first instance, that the court erroneously failed to order a mistrial *sua sponte* (there having been no objection from appellant) when the testimony was first heard. He asserts, in the second instance, that the court erroneously failed to strike the testimony

II. The court adequately charged the jury on the date of the alleged offense and the inclusion of willfulness as an element of the crime of cruelty to children.

(Tr. III: 96-97; Tr. IV: 7, 15-16)

Appellant assigns as error the court's alleged failure to instruct the jury that an element of the crime of cruelty to children is wilfulness. He further attacks as plain error the court's alleged failure to instruct the jury that they were to deliberate only upon the alleged cruel acts committed by appellant on or about October 11, 1968. A more thorough inspection of the record, however, reveals the insubstantiality of his contentions.

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and to admonish the jury to disregard it. Appellant charges that such neglect by the court afforded the jury the "luxury" of punishing him for that assault in addition to the crime charged (Brief for appellant at 10-11). While in our estimation the contentions are without merit, we are also distressed at appellant's suggestion that juries find it luxurious to mete punishment.

The act to which appellant invites reference occurred during an evening card game. Miss Hill testified that while the game was in progress the baby awoke crying. Appellant approached the baby and commanded him to "shut up." Then he "slapped him [the baby] on the beam" and beat him on the soles of his feet. Miss Hill, who rallied to the infant's defense, stated that a "big old argument" ensued. Appellant then "strangled" and "slapped" her (Tr. I: 28-29).

Because appellant was not heard to object to the testimony regarding his assault on Miss Hill, he is not entitled to the scrutiny of appellate review unless he can demonstrate plain error. *Compare* Rule 51, FED. R. CRIM. P., *with* Rule 52 (b), FED. R. CRIM. P. We note, as appellant at trial no doubt noted, that the statement referring to appellants attack upon Miss Hill was but one sentence in a trial that consumed several days. Not objecting, appellant may well have concluded that that isolated statement was without impact and therefore caused him no prejudice; alternatively, he might have tactically concluded that the error was so slight that an objection would serve no purpose other than adversely augmenting its dimension to the jury. Indeed, he might have concluded, as the Government now submits, that its admission into evidence was not error at all—that it not only properly revealed appellant's state of mind but also was so intimately a part of the assault on the child that its mention was essential to a full and accurate discription of the clearly relevant incident. *Drew* v. *United States*, *supra*; *Bracey* v. *United States*, 79 U.S. App. D.C. 23, 25-26, 142 F.2d 85, 87-88, *cert. denied*, 322 U.S. 762 (1944).

At the outset it must be observed that prior to the court's charge to the jury there was ample opportunity for appellant's counsel to draft and present instructions to the court for its consideration; however, he did not do so. Indeed, in the course of a bench conference at which instructions were considered, appellant indicated that he was content with the charge as contemplated by the court (Tr. III: 96-97). Moreover, on the following day, after the court delivered its instructions, appellant's counsel not only stated that he was satisfied but said to the court, "You did well by the defendant" (Tr. IV: 15). Thus, having failed to object at trial (thereby denying the court the opportunity to cure any alleged defect), appellant should not be heard to complain about the instructions for the first time on appeal. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); *compare* Rule 30, FED. R. CRIM. P. *with* Rule 52 (b), FED. R. CRIM. P.

In the course of its charge to the jury the court read the indictment, instructing the jury that the indictment was the manner in which appellant was charged with a crime. The court also informed the jury, reading from the indictment, that the offenses with which appellant was charged, and upon which they were to deliberate, occurred "on or about October 11, 1968." Then specifically referring to count two, the court, still reading from the indictment, recited *inter alia* that appellant is charged with "wilfully maltreat[ing] Joseph Hill" (Tr. IV: 7). In a subsequent portion of the charge, immediately after defining the term "willfully," the court read the relevant portion of the cruelty to children statute, 22 D.C. Code § 901, which makes willful maltreatment of children a crime[24] (Tr. IV: 10). Finally, upon completing the instructions, the court informed the members of the jury

[24] After reading from the statute, the court repeated the elements of the crime of cruelty but omitted the term "willfulness." The fact that it was not repeated, however, does not nullify the fact that it was specifically mentioned earlier. *Cf. Scurry* v. *United States*, 120 U.S. App. D.C. 240, 347 F.2d 468 (1965).

(as it had earlier in his charge) that they were permitted to take a copy of the indictment with them into the jury room so that they would have before them the charges upon which they were to deliberate (Tr. IV: 7, 15-16). Therefore, in our view, the jury was adequately instructed both on the date of the alleged offense and on "willfulness" as an element of the crime of cruelty to children. *See United States* v. *Powell*, D.C. Cir. No. 23,888, decided May 10, 1971, slip op. at 6-8.

III. There being different elements to the crimes and there being separate and distinct governmental and societal interests to be served, the crimes of manslaughter and cruelty to children do not merge.

Appellant's final contention is that in the circumstances of this case the crime of cruelty to children merged with the crime of involuntary manslaughter. In so urging he concedes, as he must, that the former is not a lesser included offense of the latter.[55] While we agree with his concession, we disagree with his argument on the issue of merger.

Initially, we suggest that this Court need not and should not consider the merits of appellant's argument. Appellant's sentence for the crime of cruelty to children was imposed to run concurrently with his sentence for the crime of manslaughter. *Benton* v. *Maryland*, 395 U.S. 784 (1969); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). Although appellant charges that a "myriad [of] adverse collateral consequences" may flow from his conviction of cruelty to children which presumably would

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[55] A lesser included offense is a completed offense "necessarily included" in the greater offense. *See* Rule 31 (c), FED. R. CRIM. P. A greater offense cannot be committed without also committing the lesser included crime. *Fuller* v. *United States*, 132 U.S. App. D.C. 264, 407 F.2d 1199 (1968), *cert. denied*, 393 U.S. 1120 (1969); *Crosby* v. *United States*, 119 U.S. App. D.C. 244, 339 F.2d 743 (1964). Because every crime of manslaughter need not necessarily include a victim less than eighteen years of age, the cruelty to children statute manifestly cannot be viewed as a lesser included offense within the crime of manslaughter.

not result from his manslaughter conviction (Brief for appellant at 13 n.8), he has enumerated none, and we know of none. *Compare Justin* v. *Jacobs*, D.C. Cir. No. 22,008, decided May 18, 1971. Appellant having been convicted of manslaughter, a most heinous crime, his social or legal status is not further diminished by having a record burdened with a conviction of cruelty to children. Indeed, there is a strong public interest in upholding both convictions. *United States* v. *Miller*, D.C. Cir. No. 22,332, decided March 19, 1971 (on rehearing).

On the merits we note that the elements of proof differ under the two relevant statutes. Under the cruelty to children statute the Government must prove the age of the victim in addition to the fact that he was willfully abused. Neither of those elements is required in the proof of the crime of manslaughter. *See Gore* v. *United States*, 357 U.S. 386 (1958); *Blockburger* v. *United States*, 284 U.S. 299 (1932); *United States* v. *Spears*, D.C. Cir. No. 23,043, decided February 16, 1971; *Evans* v. *United States*, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956). Therefore the cruelty conviction cannot be viewed as having merged into the manslaughter conviction.

In addition, there are distinct and valid governmental interests sought to be protected under each of the applicable statutes. The manslaughter statute was designed to safeguard human life without regard to age. 40 AM. JUR. 2D *Homicide* § 112 (1968). The cruelty to children statute, on the other hand, was promulgated specifically to afford unique protection to a selected group: children. It "rests upon the power of the state, acting as *parens patriae*, to protect the 'physical, mental or moral well-being of the child.'" *Nesbitt* v. *United States*, 205 A.2d 595, 596 (D.C. Ct. App. 1964), quoting from *People* v. *Ewer*, 141 N.Y. 129, 134, 36 N.E. 4, 6 (1894), and citing H.R. REP. No. 1957, 48th Cong., 1st Sess. (1884). Because the intent of Congress controls, *United States* v. *Spears*, *supra*, slip op. at 8, and there being no apparent congressional intent to treat the violations of both

statutes as a single crime,[56] we submit that appellant's conviction of cruelty to children should remain undisturbed, inasmuch as the sentences on the two counts are concurrent. *Cf. Smith* v. *United States*, 135 U.S. App. D.C. 284, 418 F.2d 1120 (1969); *Davenport* v. *United States*, 122 U.S. App. D.C. 344, 353 F.2d 882 (1956); *Ingram* v. *United States*, 122 U.S. App. D.C. 334, 352 F.2d 872 (1965).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[56] The cases of *Prince* v. *United States*, 352 U.S. 322 (1957); *United States* v. *Spears*, *supra*; *United States* v. *Parker*, D.C. Cir. No. 23,797, decided February 9, 1971; and *Bryant* v. *United States*, 135 U.S. App. D.C. 138, 417 F.2d 555 (1969), cited by appellant, do not provide him with the authority he seeks. In those cases a single community interest was violated, and a single legislative purpose was served. It was clearly the intent of Congress there to punish the multiple violation by one single conviction. Appellant has not shown such congressional intent in the statutes here under consideration.

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